

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF AGRICULTURE

In the Matter of the Grade "A" Permit  
Suspension of Rose Acres Trust

ORDER DENYING  
MOTION FOR  
SUMMARY DISPOSITION

The above-entitled matter is pending before Administrative Law Judge ("ALJ") Bruce H. Johnson. On January 18, 2005, Rose Acres Trust ("Rose Acres") filed a Motion to Dismiss, which the ALJ has treated as a motion for summary disposition. The Department of Agriculture ("Department") filed a letter memorandum in opposition to the motion on January 26, 2005. The OAH record for this Motion closed on that date.

Lowell Voigt, owner of Rose Acres Trust, 22846 – 150<sup>th</sup> Street, Eden Valley, MN 55329, is not represented by counsel. Francis Green III, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101-2127, represents the Department.

Based upon all of the filings in this matter, and for the reasons set out in the accompanying Memorandum,

**IT IS HEREBY ORDERED:** That the Motion to Dismiss is DENIED.

Dated this 15<sup>th</sup> day of February 2005.

/s/ Bruce H. Johnson  
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BRUCE H. JOHNSON  
Administrative Law Judge

## **MEMORANDUM**

### **Procedural Background**

Effective September 16, 2004, the Department suspended Rose Acres' permit to sell Grade "A" milk, based upon consecutive violations found during farm inspections over a four year period.<sup>[1]</sup> The Notice of Permit Suspension informed Rose Acres that to regain permit status it would need to do one of the following: 1) Correct all items listed on the inspection sheet; 2) contact a plant fieldperson for farm inspection; or 3) complete a Request for Reinstatement.<sup>[2]</sup> The Notice also contained a provision that requires the Department "to proceed to a hearing" within 72 hours of the receipt of a written application from the regulated party, so as to ascertain the facts of the violation. Rose Acres initiated this contested case proceeding on September 20, 2004, by requesting a hearing to challenge the permit suspension.

On November 5, 2004, the Department issued a Notice and Order for Hearing and Prehearing Conference, scheduling the prehearing conference for November 23, 2004. By an amended notice and order dated December 3, 2004, the date of the prehearing conference was changed to January 4, 2005.

On January 18, 2005, Rose Acres filed a Motion to Dismiss with the Administrative Law Judge based upon the Department's failure to provide a hearing within 72 hours of the request by Rose Acres. The Department filed a letter memorandum in opposition to the motion on January 26, 2005.

### **Motion to Dismiss/Summary Disposition Standard**

The Administrative Law Judge may recommend dismissal of a matter when "the case or any part thereof has become moot or for other reasons."<sup>[3]</sup> Similarly, under the same rule provision, the Administrative Law Judge may recommend summary disposition, which is the administrative equivalent of summary judgment.<sup>[4]</sup> And summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.<sup>[5]</sup> The substance of Rose Acres' motion is that there are no genuine issues of material fact, and that it is entitled to prevail as a matter of law.

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### **Applicable Law**

Minnesota adopted the 2001 Grade "A" Pasteurized Milk Ordinance ("Ordinance")<sup>[6]</sup> to regulate the production and processing of Grade "A" milk.<sup>[7]</sup> The Ordinance provides in relevant part:

Upon notification, acceptable to the Regulatory Agency, by any person whose permit has been suspended, or upon application within forty-eight (48) hours of any person who has been served with a notice of intention to suspend, and in the latter case before suspension, the Regulatory Agency

shall within seventy-two (72) hours proceed to a hearing to ascertain the facts of such violation(s) or interference and upon evidence presented at such hearing shall affirm, modify or rescind the suspension or intention to suspend.

The Notice of Permit Suspension is based upon the Ordinance language and states, “[u]pon written application you may request the Department to proceed to a hearing within 72 hours of the receipt of such application to ascertain the facts of such violation, and upon evidence presented at such hearing the suspension may be affirmed, modified, or rescinded.”

As to hearing procedures following a permit suspension, the Ordinance requires that the process set forth in the Minnesota Administrative Procedure Act (Minnesota Statutes, Chapter 14) be applied to hearings provided for in the Ordinance.<sup>[8]</sup> Accordingly, the hearing provisions of the Minnesota APA apply to this matter.

## **Discussion**

Rose Acres argues that the Department failed to provide a hearing within 72 hours of Rose Acres’ written application, and that, as a matter of law, the Department may not proceed because it failed to meet a statutory deadline. Rose Acres interprets the Ordinance to mean that the Department’s failure to *provide* a hearing within 72 hours makes the Suspension Notice void, thereby invalidating the permit suspension.<sup>[9]</sup>

The Department first argues that courts give great weight to an agency’s interpretation of a statute, especially when that agency has a long history of construing the statute.<sup>[10]</sup> Since the legislature gave the Department authority over dairy laws and rules,<sup>[11]</sup> the Department contends that its interpretation of the Ordinance, as follows, should be given great weight.

The Department goes on to argue that the Suspension Notice only directs the Department to “proceed” to a hearing within 72 hours of receiving the request. It does not require the Department to “provide” a hearing within that time. A dictionary definition of the word “proceed” indicates a process or a series of actions, “to begin and carry on an action,” or “to move along a course.”<sup>[12]</sup> The Department argues that it proceeded to a hearing by compiling documentation and summarizing data regarding Rose Acres’ inspection history for the preparation of the Notice of Hearing right after it received Rose Acres’ request for a hearing.<sup>[13]</sup> The Department suggests that this process alone could have taken more than 72 hours and that providing a hearing within that time frame is unreasonable for the Department.

Second, the Department argues that interpreting the statute to require the Department to hold a hearing within 72 hours is inconsistent with the statutory requirement that the hearing be conducted in accordance with the Administrative Procedure Act, because the processes required by that Act take much longer than 72 hours to occur. For example, the Administrative Procedure Act and the rules that implement that Act require, among other things, assigning an administrative law judge,

scheduling a hearing date, and serving a notice of hearing on the respondent at least 30 days before the hearing date. In other words, if one were to accept Rose Acres' interpretation, it would be impossible for the Department to comply with the legislative directive to conform to the requirements of the Administrative Procedure Act. Statutes must be interpreted "in such a way as to give effect, where possible, to each of two conflicting provisions."<sup>[14]</sup> And the Department's interpretation of the Ordinance is the only one that does that. Also, in interpreting statutes, one must "assume that the legislature did not assume an unreasonable result."<sup>[15]</sup> And that would clearly happen if one were to accept Rose Acres' interpretation of the Ordinance.

Also, it does not appear that Rose Acres has suffered any prejudice in the interim period because it has continued to be able to sell Grade "A" milk, even after receiving the Notice of Suspension.<sup>[16]</sup>

Finally, the Department cites case law stating that it is a "well-established rule of statutory construction that statutory provisions defining the time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system and dispatch in public business are generally deemed directory."<sup>[17]</sup> According to the Department, the purpose of the Ordinance is to protect the public from unsafe milk, and that it clearly is meant to "secure order, uniformity, system and dispatch." Consequently, the 72-hour provision in the Ordinance is directory, not mandatory, and any failure by the Department to act within the time frame does not deprive it of its jurisdiction to suspend Rose Acres' permit.

Of the Department's positions, the ALJ is most convinced by the fact that the Ordinance and Notice of Suspension contain the word "proceed" instead of "provide" or "convene" or "hold." This indicates a process or course of action that must be initiated within 72 hours. Seventy-two hours is likely an unreasonable amount of time in which to convene a hearing given the procedural requirements of the APA and the amount of work to be completed by the Department. The ALJ agrees that such a requirement would be "unworkable in practice and unduly burdensome on the State." In other words, the Department's interpretation of the Ordinance reconciles what appear to be two conflicting statutory requirements, while Rose Acres' interpretation does not. Since decisions of Minnesota's higher courts indicate that all parts of a statute must be given effect whenever possible, the ALJ accepts the Department's interpretation here. This matter shall therefore proceed to a hearing so that the parties can provide testimony and the ALJ can make an informed recommendation about Rose Acres' permit suspension based upon that evidence.

**B.H.J.**

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<sup>[1]</sup> Notice and Order for Hearing and Prehearing Conference, p. 7. On that same day, the Department certified Respondent to manufacture and sell Grade B milk. *Id.* The Department first issued Respondent

a permit to sell Grade “A” milk on September 11, 1991, pursuant to Minn. Stat. § 32.394, subd. 5. *Id.* at p. 2.

<sup>[2]</sup> See the attachment to Rose Acres’ motion to dismiss.

<sup>[3]</sup> Minn. Rule pt. 1400.5500 (K). Other reasons might include failure to state a claim upon which relief can be granted, lack of jurisdiction, or insufficient service of process. See Minn.R.Civ.P. 12.02.

<sup>[4]</sup> Minn. Rule pt. 1400.5500 (K).

<sup>[5]</sup> *Sauter v. Sauter*, 244 Minn. 482, 484; 70 N.W. 2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W. 2d 63, 66 (Minn. Ct. App. 1985); Minn. Rule Civ. Pro. 56.03.

<sup>[6]</sup> See <http://vm.cfsan.fda.gov/~ear/p-nci.html>.

<sup>[7]</sup> Minn. Stat. § 32.394, subd. 4 (2004).

<sup>[8]</sup> See <http://vm.cfsan.fda.gov/~ear/p-nci.html>.

<sup>[9]</sup> The Department acknowledged this point of view and drafted its letter memo as if Rose Acres sought to challenge the permit suspension. However, the Department points out that Rose Acres initially requested the hearing on the matter, and that a request to dismiss the hearing would actually cause the permit suspension to be affirmed.

<sup>[10]</sup> *Cummings v. Koehnen*, 556 N.W.2d 586 (Minn. Ct. App. 1996); *McAfee v. Dep’t of Revenue*, 514 N.W.2d 301 (Minn. Ct. App. 1994).

<sup>[11]</sup> Minn. Stat. § 32.394.

<sup>[12]</sup> Merriam-Webster OnLine Dictionary, <http://www.m-w.com/cgi-bin/dictionary>.

<sup>[13]</sup> Affidavit of Kevin Elfering, paragraph 4.

<sup>[14]</sup> *Country Joe, Inc. v. City of Eagan*, 548 N.W.2d 281, 284 (Minn. Ct. App. 1996), *aff’d* 560 N.W.2d 681 (Minn. 1997).

<sup>[15]</sup> *Id.*

<sup>[16]</sup> Affidavit of Francis Green III.

<sup>[17]</sup> *Szzech v. Comm’r of Pub. Safety*, 343 N.W.2d 305, 307 (Minn. Ct. App. 1984), *quoting Wenger v. Wenger*, 200 Minn. 436, 438, 274 N.W. 517, 518 (1937).